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No. 07-663

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AK STEEL CORPORATION RETIREMENT ACCUMULATION PENSION PLAN AND AK STEEL CORPORATION BENEFIT PLANS ADMINISTRATIVE COMMITTEE

Petitioners,

v.

JOHN D. WEST, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Review should be granted to resolve two important questions on which the circuits are divided.

I. The § 502(a)(1)(B) Issue Warrants This Court's Review.

The Sixth Circuit held that Respondents could enforce ERISA statutory provisions under ERISA § 502(a)(1)(B) even though § 502(a)(1)(B) applies only to claims arising under "the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). That holding exacerbates a circuit split on the scope of § 502(a)(1)(B) and jeopardizes the federal courts' exclusive jurisdiction over the interpretation of ERISA. *See* Pet. 13-21.

Respondents counter by hotly denying that their claim is a statutory claim. Opp'n 1-2. The heat of Respondents' rhetoric, however, is inversely related to the strength of their argument. The District Court, the Sixth Circuit, and Respondents themselves all acknowledged in the proceedings below that Respondents seek to enforce provisions of ERISA, not "the terms of the plan."

A. Respondents asserted a statutory claim.

Respondents assert that "[t]his case does not involve a claim for 'statutory violation of ERISA.'" Opp'n 3. Their own brief belies that contention. As stated in the Brief in Opposition, Respondents' claim is that the Plan violated the "core principle of ERISA" that a lump sum payment from a pension plan must be the "actuarial equivalent" under 26 USC § 417(e) of the annuity that a participant could

have elected to receive beginning at age 65. Opp'n 8, 13.

That claim seeks to enforce a purported ERISA *statutory* guarantee. There is no guarantee in the *Plan* that a participant's lump sum payment shall be the "actuarial equivalent" of an annuity payable at age 65. The Plan provides only that lump sum payments shall be equal to a participant's account balance. Pet. App. 90a. Nor do Respondents *argue* that the Plan provides an actuarial equivalence guarantee. Respondents derive such a guarantee solely from ERISA – specifically, from ERISA §§ 204(c)(3) and 203(a)(2)(A) and the corresponding regulations. *See* Opp'n 4-6, 8-9, 11. It is these ERISA *statutory* provisions that Respondents seek to enforce.

Respondents expressly conceded in the proceedings below that their claim is a statutory claim. They alleged in the Complaint that "The primary question that will determine defendants' liability. . . is whether defendants violated ERISA § 204(c)(3) and I.R.C. § 417(e) by issuing lump sum distributions that were less than the 'actuarial equivalent' of an annuity commencing at normal retirement age. . . ." C.A. App. 22. Similarly, in opposing Petitioners' motion to dismiss, Respondents argued:

> The claim in this case does not seek an interpretation of the plan. Rather, plaintiffs' claim is that the Plan itself violates ERISA and the Internal Revenue Code – specifically, that the method provided in the Plan for lump

> sum distributions violates ERISA § 204(c)(3) and I.R.C. § 417(e).

App., *infra*, 3a.

The District Court and the Sixth Circuit both agreed with Respondents that their claim is a statutory claim. In denying Petitioners' motion to dismiss, the District Court found:

> Plaintiff is not disputing that the AK Steel Committee calculated his benefit in accordance with the terms of the AK Steel Plan. Rather, he is arguing that the plan itself violates ERISA.

C.A. App. 65. The Sixth Circuit likewise observed that: "The plaintiffs argue that ERISA mandates the whipsaw calculation. . . and that AK Steel's failure to calculate lump sum distributions in this manner constitutes a statutory violation of ERISA." Pet. App. 8a. The Sixth Circuit ultimately accepted this statutory argument, holding that "[t]he Plan's terms thus did not comply with the law." *Id.* at 26a.

Respondents nevertheless assert that all they are seeking is payment of the "accrued benefit" defined in Section 1.2 of the Plan. Opp'n 13. That is not correct. Section 1.2 defines an "accrued benefit" as an annuity beginning at age 65. Pet. App. 76a. Respondents did not *elect* an annuity payable at age 65 and they are not *suing* for an annuity payable at age 65. Instead, Respondents are suing for an increase in their lump sum payments. Section 1.2 of the Plan says nothing about the calculation of lump sum payments; such payments are governed by Plan Section 4.1. *See id.* at 76a, 90a.

Respondents' rhetoric notwithstanding, they are not suing to enforce Plan Section 1.2's definition of "accrued benefit"; they are suing to *override* Section 4.1's provision that lump sum payments shall be equal to a participant's account balance. Their claim, stated in their own words, is that "Section 4.1 is void for illegality" because it violates a "core principle of ERISA." Opp'n 13, 20-21.

B. The circuits are divided on the interpretation of § 502(a)(1)(B).

Respondents' rhetoric fails to obscure the fact that the Sixth Circuit enforced a purported ERISA *statutory* guarantee under § 502(a)(1)(B). *See* Pet. App. 19a-24a, 26a-27a. That unavoidable fact places the Sixth Circuit's decision in conflict with decisions of the Fifth Circuit, the Eighth Circuit, and the courts of several states.

Respondents *do not dispute* that the Sixth Circuit's decision conflicts with decisions of several state courts. *See* Pet. 14-18. Respondents' failure to address these state court decisions is understandable: the decisions cannot be reconciled with the holdings of the Sixth and Seventh Circuits that ERISA provisions may be enforced under § 502(a)(1)(B).

Respondents argue that there is no conflict with the Eighth Circuit's decision in *Ross* v. *Rail Car Am. Group Disability Income Plan*, 285 F.3d 735 (8th Cir. 2002), because *Ross* allegedly "did not involve a claim for benefits due under. . . the requirements of ERISA." Opp'n 17. But *Ross* involved precisely such a claim. The plaintiff in *Ross* argued that he was entitled to additional benefits because two plan

amendments that reduced his benefits had been adopted in violation of ERISA § 402(b)(3). 285 F.3d at 740. The Eighth Circuit held that this was not a claim for benefits due "under the terms of the plan" that could be asserted under § 502(a)(1)(B), but was instead an attempt to "enforce a provision of [ERISA]" that could be asserted only under § 502(a)(3). *Id.* at 740-41. That holding directly conflicts with the Sixth Circuit's holding that a plan participant *can* enforce ERISA provisions under § 502(a)(1)(B).

Respondents also assert that there is no conflict with the Fifth Circuit's decision in *Carrabba* v. *Randalls Food Markets, Inc.*, 252 F.3d 721 (5th Cir. 2001), because *Carrabba* merely affirmed a district court decision "without opinion." Opp'n 18. In fact, the Fifth Circuit *did* issue a short published opinion in *Carrabba*. The court's opinion affirms the district court decision "based on that court's conscientious, well-reasoned opinions, which will be published." 252 F.3d at 721. The Fifth Circuit thus adopted the district court's holding that ERISA provisions cannot be enforced under § 502(a)(1)(B). *See Carrabba* v. *Randalls Food Mkts., Inc.*, 145 F. Supp. 2d 763, 770 (N.D. Tex. 2000). That holding squarely conflicts with the Sixth Circuit's decision in this case.

C. Review should be granted to restore exclusive federal jurisdiction over ERISA.

Respondents do not deny that the Sixth Circuit's interpretation of § 502(a)(1)(B) allows state courts to interpret and apply the provisions of ERISA. *See* Pet. 19-22. They argue, however, that

preserving exclusive federal court jurisdiction over ERISA does not matter because state courts are competent expositors of federal law. *See* Opp'n 18-19.

It mattered a great deal to Congress. Congress did not want the nation's pension plans to be subjected to a conflicting patchwork of decisions rendered by the courts of fifty different states. *See* Pet. 19-21. It therefore crafted the provisions of § 502(a) to restrict the interpretation of ERISA exclusively to federal courts. *See id.* The Sixth Circuit's reading of § 502(a)(1)(B) thwarts that Congressional design. Certiorari should be granted to assure that the interpretation of ERISA will remain, as Congress intended, "exclusively a federal concern." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004).

D. Respondents' merits arguments are unavailing.

Respondents argue that the Sixth Circuit was correct to hold that ERISA provisions may be enforced under § 502(a)(1)(B) because, they say, the provisions of ERISA are "implied" terms of a pension plan. *See* Opp'n 15-16. That argument founders on the language of the statute. The remedial provisions of ERISA § 502(a) draw an explicit distinction between claims that seek the enforcement of plan terms and claims that seek the enforcement of ERISA provisions. Section 502(a)(1)(B) applies only to claims based on "the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Section 502(a)(3), by contrast, applies to claims based on either the "provisions of this title *or* the terms of the plan." 29 U.S.C. § 1132(a)(3) (emphasis added).

This clear and precise statutory language refutes any argument that ERISA statutory claims may be shoe-horned into § 502(a)(1)(B) on the theory that ERISA provisions constitute "implied" plan terms. If that were the case, then § 502(a)(1)(B)'s reference to "the terms of the plan" would have the same meaning as § 502(a)(3)'s reference to the "provisions of this title *or* the terms of the plan." That cannot be correct, particularly in a "carefully crafted" and "reticulated" provision such as ERISA § 502(a). *See Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 251-54, 257-78 (1993).

Respondents pluck rhetoric from this Court's decisions in an effort to support their argument, *see* Opp'n 15-16, but these decisions merely support the elementary proposition that plan terms are subordinate to, and overridden by, provisions of ERISA. This Court's decisions do *not* endorse the very different proposition that ERISA statutory claims may be treated as claims that seek enforcement of "the terms of the plan" within the meaning of § 502(a)(1)(B). Congress used the phrase "the terms of the plan" in § 502(a)(1)(B) precisely and deliberately. Indeed, it used that phrase for the specific purpose of *excluding* statutory claims from the ambit of § 502(a)(1)(B), so that state courts would have no jurisdiction to interpret ERISA provisions. *See* Pet. 20-21. Respondents' "implied" plan terms argument tramples this "carefully crafted" Congressional design. *Mertens*, 508 U.S. at 254. *See also* Pet. 17-18.

Far from supporting Respondents' argument, this Court's decisions support Petitioners. In *Varity Corp.* v. *Howe*, for example, this Court observed that

§ 502(a)(1)(B) provides a remedy for claims based on "the interpretation of *plan documents*." 516 U.S. 489, 512 (1996) (emphasis added). Similarly, in *Davila*, this Court explained that § 502(a)(1)(B) "is relatively straightforward. If a participant or beneficiary believes that *benefits promised to him under the terms of the plan* are not provided, he can bring suit seeking provision of those benefits." 542 U.S. at 210 (emphasis added). Here, Respondents seek neither "the interpretation of plan documents" nor "benefits promised under the terms of the plan." Instead, they seek benefits allegedly promised by the provisions of ERISA.

Respondents also assert that if ERISA provisions cannot be enforced under § 502(a)(1)(B), then "any plan could deprive its participants of § 502(a)(1)(B)'s remedy for 'benefits due' simply by stating that the plan's 'accrued benefit' will not be paid."[1] Opp'n 14. Not so. A court confronted with such a plan could reform the plan to comply with ERISA under ERISA § 502(a)(3). *See* Pet. 18 n.7. Significantly, only a *federal* court may hear a claim under § 502(a)(3).[2]

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[1] This case is far removed from Respondents' hypothetical. The Plan was adopted in 1994, before the whipsaw theory emerged from the IRS. Indeed, the IRS expressly approved the Plan as lawful in a determination letter granted in 1996. Pet. App. 6a. The Plan merely adopted a method of calculating lump sum payments that in hindsight has been found to violate an unanticipated interpretation of ERISA.

[2] Respondents here may not proceed under § 502(a)(3) because the Sixth Circuit found that they waived any claim under § 502(a)(3) in the Complaint, and because they did not attempt (...continued)

II. The *Contra Proferentem* Issue Warrants This Court's Review.

A. *Contra proferentem* made a difference in this case.

Respondents assert that *contra proferentem* made no difference to the Sixth Circuit's decision in this case. Opp'n at 20-22. The Sixth Circuit's opinion does not support that assertion: the court explicitly relied on *contra proferentem* to reject a defense to the asserted whipsaw violation.

As explained in the Petition, a Treasury Regulation divides defined benefit plans into two categories: those that express benefits in the form of an annuity payable at age 65, and those that express benefits in some *other* form such as an account balance. Pet. 11-12 & n.4. For plans that express benefits in a form *other* than an age-65 annuity, ERISA provides that the "project-forward" step of the whipsaw calculation should be performed at the same interest rate as the "discount-back" step. *Id.* Cash balance plans that qualify for this treatment can make lump sum payments equal to a participant's account balance without violating ERISA. *Id.* at 12. Here, under the Plan Administrator's interpretation of the Plan, the Plan qualifies for this treatment. The Plan Administrator construed the Plan as one that expresses benefits in

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to make the necessary showing that a reformation of the Plan would be "equitable" and "appropriate." *See* Pet. 9-10, 18 n.7.

the form of an account balance rather than an age-65 annuity. *Id.*

The Sixth Circuit held, however, that the Plan cannot take advantage of the Treasury Regulation because the Plan expresses benefits in the form of an age-65 annuity. App. 25a-26a. In reaching this conclusion, the court acknowledged a potential conflict between the Plan's definition of "accrued benefit" and its provisions relating to lump sum payments. *Id.* at 26a. Rather than determining whether the Plan Administrator's resolution of this ambiguity was an abuse of discretion, the court invoked *contra proferentem* to summarily resolve the ambiguity against the drafter: "To the extent that the Plan's language with respect to lump-sum distributions is ambiguous in that it conflicts with the definition of 'accrued benefit' in another section of the Plan, the ambiguity must be resolved in the plaintiffs' favor." *Id.* The decision thus applied *contra proferentem* to cut off a defense to Respondents' claim. *See also* Pet. 25-26.

Curiously, Respondents invoke the principle that ERISA plans should not be interpreted "in a way that violates the requirements of ERISA." Opp'n 21-22. That principle supports the Plan Administrator's interpretation of the Plan. The Plan Administrator construed the Plan in a manner that *avoids* any violation of ERISA. The Sixth Circuit, applying *contra proferentem*, overruled that interpretation in favor of one that *creates* a violation.

Citing the deposition testimony of AK Steel employee Richard Ford, Respondents also argue that "the plan administrator testified he had never considered" Section 1.2 of the Plan. Opp'n 2, 21 n.6.

Respondents assert that this testimony undermines "the plan administrator's" interpretation of the Plan, but they are fundamentally mistaken: the Plan Administrator is the Benefit Plans Administrative Committee, not Mr. Ford. Pet. App. 92a. Mr. Ford is simply a corporate employee who performs day to day administrative functions and carries out the instructions of the Committee. He has no responsibility or authority to interpret the provisions of the Plan; that power lies with the Committee. *Id.*

B. The circuits are split on the *contra proferentem* issue.

Respondents do not dispute that four circuits hold that *contra proferentem* does not apply where, as here, an ERISA plan grants the plan administrator discretion to interpret the plan. *See* Pet. 24-25 (citing cases from the Second, Eighth, Ninth, and Tenth Circuits).

By contrast, the Fourth and Sixth Circuits *do* apply *contra proferentem* in these circumstances. *See* Pet. 25-26. Respondents try to minimize the Sixth Circuit's application of *contra proferentem* by citing dicta from unpublished Sixth Circuit decisions. Opp'n 24-26. Even the farthest-reaching statement quoted by Respondents, however, states only that *contra proferentem* does not "*completely* contradict" deference to an administrator. *Id.* at 25, quoting *Mitchell* v. *Dialysis Clinic, Inc.*, 18 F. App'x 349, 353 (6th Cir. Aug. 24, 2001) (unpublished) (emphasis added). Moreover, the published decision in this case confirms that the Sixth Circuit does, in fact, apply *contra proferentem* notwithstanding a plan administrator's discretion to interpret the plan. The decision quotes and relies on unequivocal Sixth

Circuit precedent: "Any ambiguities in the language of the ERISA plan are to be construed strictly against the drafter of the plan." Pet. App. 26a, quoting *Regents of the Univ. of Mich.* v. *Employees of Agency Rent-A-Car Hosp. Ass'n*, 122 F.3d 336, 340 (6th Cir. 1997) (brackets omitted).

The Fourth Circuit follows the same approach as the Sixth. *See* Pet. 26. Contrary to Respondents' assertion, in *Carolina Care Plan, Inc.* v. *McKenzie*, the court made clear that "when plan language is ambiguous, this well-established doctrine of *contra proferentem* does apply." 467 F.3d 383, 389 (4th Cir. 2006). The court stated that it would defer only to the administrator's interpretation of "*unambiguous* plan terms." *Id.*

Furthermore, Respondents acknowledge the differing "hybrid approach" adopted by the Fifth Circuit. Opp'n 23-24. That approach applies *contra proferentem* to determine the "legally correct" interpretation of an ERISA plan and compares it to the administrator's interpretation. *Id.*, citing *Spacek* v. *Maritime Ass'n*, 134 F.3d 283, 298 (5th Cir. 1998); *see also id.* at 299 n.14. Though Respondents do not mention it, the Eleventh Circuit takes the same "hybrid" approach. *See* Pet. 27.

Respondents cite the Tenth Circuit's dicta that it "do[es] not view [the Fifth Circuit's approach] as conflicting." Opp'n at 24, citing *Kimber* v. *Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999). Nevertheless, the Fifth and Eleventh Circuits would reach different results than the Tenth and other circuits in many cases. If a plan administrator construes the plan differently from the *contra proferentem* construction, the Eleventh Circuit will

uphold the administrator's construction *only* if the plan administrator proves its decision "is not tainted by self-interest." *HCA Health Servs. of Ga., Inc.* v. *Employers Health Ins. Co.*, 240 F.3d 982, 994-95 (11th Cir. 2001). The other circuits impose no such requirement on plan administrators.

Certiorari should be granted to resolve this conflicting circuit authority.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 2, 2008

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

John D. West, on Behalf Of Himself
and All Other Persons Similarly Situated

Plaintiffs

v.

AK Steel Corporation (formerly ARMCO Inc.)
Retirement Accumulation Pension Plan, a Part of the
AK Steel Corporation (formerly ARMCO Inc.)
Noncontributory Pension Plan and AK Steel
Corporation Benefit Plans Administrative
Committee,

Defendants

Case No.: C-1-02 0001

District Judge Sandra S. Beckwith

Magistrate Judge Jack Sherman, Jr.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR ENTRY OF JUDGMENT THAT PLAINTIFF'S CLAIM IS TIME-BARRED

This class action was brought by named plaintiff John D. West on behalf of himself and over 700 other participants in the AK Steel Corporation Retirement Accumulation Pension Plan who retired

or were terminated on or after January 1, 1995 and received lump sum distributions of their pension benefits ("Plaintiffs"). Plaintiffs claim that the method provided in the Plan for calculating lump sum distributions violated the Employee Retirement Income Security Act ("ERISA") and corresponding provisions of the Internal Revenue Code ("I.R.C.").

Defendants assert that the named plaintiffs claim is "time-barred," citing a line of cases holding that "reasonable contractual limitations of a party's right to bring suit are enforceable and supersede the statute of limitations under state law." *Allen v. Unionmutual Stock Life Ins. Co. of America*, 989 F. Supp. 961, 965 (S.D. Ohio 1997). *See also Santino v. Provident Life & Accident Ins. Co.*, 276 F.3d 772, 774-76 (61' Cir. 2001). However, those cases involve express contractual limitations on the commencement of suit. *See, e.g.*, Santino, 276 F.3d at 774 (bracketed insert by the court) ("No [legal] action may be brought after three years from the time written proof of loss is required to be given"). In contrast, the Plan provision relied on by Defendants is not a limitation period for the commencement of suits against the Plan, but merely a time limit for seeking an administrative remedy under the Plan's internal appeals procedure. As shown below, the named plaintiffs claim is not "time-barred" by that provision, either on the basis of the statute of limitations defense asserted by Defendants or under the doctrine of exhaustion of administrative remedies.

A. Plaintiffs Assert A Statutory Claim That the Method Provided in the Plan for Calculating Lump Sum Distributions Violates ERISA and the Internal Revenue Code

Plaintiffs' claim is a statutory claim – that the method provided in the Plan for calculating lump sum distributions violates ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3), and I.R.C. § 417(e). The nature of the claim has an important bearing on Defendants' contention that the claim is "time-barred," and is explained in detail below.

* * *

2. By the nature of the claim presented in this case, exhaustion of administrative remedies should not be required

Another reason why any non-exhaustion involving the 90-day administrative filing provision should be excused arises from the nature of Plaintiffs' claim. The claim in this case does not seek an interpretation of the plan. Rather, Plaintiffs' claim is that the Plan itself violates ERISA and the Internal Revenue Code – specifically, that the method provided in the Plan for calculating lump sum distributions violates ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3), and I.R.C. § 417(e). A wealth of case law in the Sixth Circuit and elsewhere establishes that exhaustion of administrative

remedies is not required in order to seek a federal court adjudication of ERISA and I.R.C. violations.

* * *

Conclusion

For the reasons addressed above, defendants' motion for entry of judgment that plaintiffs' claim is time-barred should be denied.

Respectfully submitted,

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